IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.747 OF 2005

Hirsingh T. Rao,
Age 50, having office at
11-C, Nirmal Nariman
Point, Mumbai-400 021. .... Petitioner

- Versus -

1. The State of Maharashtra
2. The Senior Inspector of
Police, Marine Drive
Police Station, Mumbai. .... Respondents

Shri S. Halwasia i/b M/s. Halwasia & Co.
for the Petitioner.
Shri I.S. Thakur, Addl. Public Prosecutor,
for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.
DATED: MAY 04, 2005

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Rule. By consent, the rule is made

returnable forthwith.

2. The petitioner challenges the reluctance on the part of the police authorities to investigate into the matter inspite of specific direction in that regard by the learned Magistrate in exercise of powers under the provisions of law comprised under the Code of Criminal Procedure, 1973.

3. Few facts relevant for the decision are that the accused person, namely Mrs. Kanak Podar set up an office at Nariman Point, a show room at Malad and another office at New Marine Lines, Mumbai in February, 2004 and possessed three Ford Cars. It is the case of the petitioner that she represented to be the member of Podar family which is a renowned industrial and philanthropic group apparently running several factories, schools, colleges, hospitals and Trusts. She also is stated to have claimed to have exclusive agency of Nokia mobile phones and promised to give mobile phone hand-sets at cheap rates. According to the petitioner, induced by the representation made for supply of the Nokia mobile phones at attractive prices and to be delivered within one month, the petitioner paid a sum of Rs.7,05,000/- to the accused in April, 2004. The mobile phones were to be delivered by May, 2004. However, not a single phone was received by the petitioner. On being

warned of legal action, the accused gave three post-dated cheques. When the cheques were presented for encashment, they were returned dishonoured on account of insufficiency of funds which was revealed from the bank memos received by the petitioner. Having contacted the accused in that regard, she refused to pay the amount and allegedly claimed close contact with a Deputy Commissioner of Police, Mumbai and that no criminal action would be maintainable against her. The petitioner, therefore, filed a written complaint with the police station on 30-11-2004 but the police refused to register the same. The petitioner, therefore, approached the Judicial Magistrate in December last and after hearing the petitioner, the learned Magistrate, under Section 156(3) of the Cr.P.C. directed the police to investigate into the matter. Consequently the FIR was registered as MECR No.14 of 2004 on 22-12-2004 at the Marine Drive police station. While the investigation was in progress, it is the case of the petitioner that at the instance of a senior police officer the investigation was sought to be abandoned on the ground that it is not a cognizable offence and therefore the police cannot investigate into the matter and the petitioner could take resort to the proceedings under Section 138 of the Negotiable Instruments Act, 1881. Inspite of a letter addressed by the petitioner to the Deputy Commissioner of Police on 27-1-2005, the

police failed to take any action. Hence the petition.

4. When the petition was filed, though allegation was made that the investigation had stopped at the instance of a senior police officer, the petitioner had not disclosed the name of such officer and therefore the petitioner was directed to file a proper affidavit disclosing all the details. Accordingly, the affidavit was filed stating that though PSI Shivalkar had started the investigation, the petitioner believes that the Deputy Commissioner of Police, Zone-I, Mumbai, namely Shri Nawal Bajaj has stalled the investigation. Pursuant to the notice issued to the respondents, two affidavits came to be filed - one by Shri Sagar J. Shivalkar, Police Sub-Inspector attached to the Marine Drive police station and the another by Shri Nawal Yashpal Bajaj, the Deputy Commissioner of Police, Zone-I, Mumbai. While the affidavit of PSI Shivalkar discloses that he being satisfied about the prima facie case of cheating having been made out, had commenced the investigation and had put up the papers for scrutiny before the Deputy Commissioner of Police through the Senior Inspector of Police, the affidavit of Shri Nawal Bajaj, the Deputy Commissioner of Police, discloses that he was prima facie of the opinion that no case of cheating was made out under Section 420 of the Indian Penal Code and consequently the case was squarely within

the four corners of Section 138 of the Negotiable Instruments Act and that therefore it was not a cognizable offence.

5. It cannot be disputed that merely because a cheque is dishonoured that it would disclose commission of offence of cheating, punishable under Section 420 of the Indian Penal Code. It is so because the basic ingredient of the offence under Section 420 of the Indian Penal Code would be cheating with the intention to cheat from the very inception. In order to hold a person to be guilty of the offence of cheating, it is necessary to be established that the intention of the person was dishonest at the time of making the promise. Obviously, such dishonest intention cannot be inferred from the mere fact that subsequently the person was not able to fulfil the promise. There must be material on record to disclose that right from the inception, the person had dishonest intention to cheat or not to fulfil the promise.

6. Reverting to the facts of the case, the petitioner had clearly stated that right from the beginning the accused had dishonest and fraudulent intention in her mind to cheat the complainant and the said allegation was sought to be made good by stating that inspite of taking a huge amount of Rs.7,05,000/- not a single

mobile phone was delivered to the petitioner and further more, after issuing the cheques, no arrangement was made for sufficient funds for honouring the said cheques. The past conduct of the accused, as stated by the petitioner, if established or remains uncontroverted, apparently it discloses dishonest intention to cause loss to the petitioner by not fulfilling the promise made by the accused. Apparently therefore, considering the facts of the case, the ingredients of cheating under Section 420 of the Indian Penal Code are revealed for the purpose of investigation. Undoubtedly, in case the petitioner fails to establish those allegations by producing the necessary materials in support thereto, certainly the respondents would be justified in submitting that there is no case for initiating prosecution under Section 420 of the Indian Penal Code, but in the background of the facts disclosed in the petition and as it is revealed that the same facts are disclosed in the complaint, there was sufficient material to hold that prima facie there is a case made out for investigation in relation to the alleged cheating by the accused person. In the case in hand, therefore, the respondents were not justified in contending that it is a non-cognizable case or that it squarely falls within the four corners of Section 138 of the Negotiable Instruments Act, and that therefore, there cannot be investigation by the police. Albeit the

petitioner is not forbidden from taking action under Section 138 in relation to dishonour of the cheques. However, that by itself, in the facts and circumstances of the case, will not debar the petitioner from complaining of the commission of offence by the accused person punishable under Section 420 of the Indian Penal Code.

7. In the result, therefore, the petitioner is justified in seeking direction to the respondents to continue with the investigation pursuant to the order of the learned Magistrate regarding the alleged commission of the offence by the accused person punishable under Section 420 of the Indian Penal Code pursuant to registration of the MECR No.14 of 2004 at the Marine Drive police station.

8. The petition, therefore, succeeds. The rule is made absolute in above terms with no order as to costs.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)